Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-128

FRANK CONSTANTINO,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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INDEX

TABLE OF AUTHORITIES II

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

QUESTIONS PRESENTED FOR REVIEW 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT—

The Georgia Statutes Which Make It A Criminal Offense For Using A Telephone For The Purpose Of Harassment Are Unconstitutional For Vagueness And Indefiniteness, Thus, They Are Repugnant To The United States Constitution For They Deny Due Process Of Law And The Equal Protection Of Laws 5

CONCLUSION 8

CERTIFICATE OF SERVICE 9

APPENDIX "A"—

Opinion Of The Supreme Court Of Georgia, May 2, 1979 ..... A1

Table of Authorities

CASES

Cline v. Frank Dairy Co., 274 U.S. 445 (1927) 5

Connally v. General Construction Co., 269 U.S. 385 (1926) pp. 392, 393 6

Gooding, Warden v. Wilson, 405 U.S. 518 (1972) 6
Herndon v. Lowry, 301 U.S. 242 (1937) 6
Orr v. Orr, No. 77-1119, Slip Opinion, dated March 5, 1979, Supreme Court of U.S. (not now officially reported), 47 LW 4224-4232 5
U. S. v. Capital Traction Co., 34 App. D.C. 592 ..... 6, 7
U. S. v. Petrillo, 332 U.S. 1 (1947) 5

STATUTES

Ga. Code Ann. 26-2610; *Ga. Laws* 1968, pp. 1249, 1974, p. 470, as amended 2, 7
Ga. Laws 1968, p. 9; *Ga. Code Ann.* 104-9901 ..... 2, 7

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The Petitioner, Frank Constantino, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on May 2, 1979.

OPINIONS BELOW

The Supreme Court of Georgia's opinion was rendered on May 2, 1979 affirming the conviction of Petitioner under the style of Constantino v. State, No. 34704. A copy of this opinion is appended hereto as Appendix "A", said opinion not now being officially reported.

STATEMENT OF JURISDICTION

The judgment in this case by the Supreme Court of Georgia was entered on May 2, 1979. Within ninety days after the entry of that Court's judgment, this petition

for certiorari was filed in accordance with the time requirements specified in Rule 22 (1) of this Court.

Jurisdiction of this Court to review the judgment in question is conferred by 28 USC § 1257 (2) in that said judgment the question of the validity of criminal statutes of the State of Georgia was upheld, and Petitioner's claims that the statute was repugnant to the United States Constitution were rejected.

QUESTIONS PRESENTED FOR REVIEW

Whether statutes which make it a criminal offense for using a telephone for the purpose of harassment (*Ga. Code Ann.* 26-2610 (3) *and* 104-9901 (b)) are unconstitutional for vagueness and indefiniteness thus being repugnant to the Fourteenth Amendment to the United States Constitution for denial of due process of law and equal protection of laws.

STATUTES INVOLVED

Ga. Code Ann. 26-2610 reads in part as follows:

"A person who commits any of the following acts is guilty of a misdemeanor: - - - - (e) Telephones another repeatedly, whether or not conversation ensues, for the purposes of annoying, harassing or molesting another or his family, or uses over the telephone language threatening bodily harm, or telephones and intentionally fails to hang up or disengage the connection, or knowingly permits any telephone under his control to be used for any purpose prohibited by this subsection." (*Ga. Laws* 1968, pp. 1249, 1316; 1974, p. 470, as amended.)

Ga. Laws 1968, p. 9, reads in part as follows: "Whoever by means of telephone communication in this State:

- - - - (b) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at the called number; or makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number - - - - shall be guilty of a misdemeanor." (Ga. Code Ann. 104-9901.)

STATEMENT OF THE CASE

Petitioner was indicted along with his wife, Patsy Constantino, for twelve counts of the offenses of using a telephone for the purpose of harassment. (T. 187) Two witnesses who were employees of the Southern Bell Telephone Company were called by the State to testify about a "security trap" that was placed on the telephone of one John Paul Jones, and as a result of their investigation there were a number of telephone calls that were received at the Jones' residence that came from a number of a telephone which was located in the Petitioner's home. (T. 3-25)

Jones testified for the State that he knew Petitioner, had visited with Petitioner in his home, and that he became acquainted with Petitioner because of difficulties that Petitioner was having with his children with an agency of the State. He further testified that he had received many telephone calls from the Petitioner and had instructed him not to call any more. (T. 25-96)

Jones' wife, Jan Jones, testified that she had received a number of telephone calls from Petitioner and his wife and identified the voices of the Petitioner and his wife, even though she had never personally met them. (T. 104-123)

Then counsel for the Petitioner moved for a directed verdict of acquittal, and one of the grounds urged was the renewal of what he contended in a demurrer filed to the indictment that the statute under which Petitioner was being tried was unconstitutional for vagueness and violated the provisions of the First and Fourteenth Amendments to the federal constitution. (T. 21-23) The Trial Court denied the motion and overruled the demurrer.

Several witnesses testified in behalf of the Petitioner who said that Petitioner's telephone was constantly ringing, and they made inquiry as to why Petitioner did not answer his phone and learned from him that someone had been making harassing calls to him. (T. 134-143).

Petitioner testified in his own behalf and denied making telephone calls to Jones except ones asking for help regarding the custody of his children who had been taken from the Petitioner by the Department of Family and Children Services, a State agency. (T. 158-177)

Thereafter, the Judge charged the jury (T. 187-202), and the jury found the Petitioner and his wife guilty on all counts. (T. 205) Then the Trial Court again refused to sustain the demurrer to the indictment which challenged the constitutionality of the statute on which the indictment was based. (T. 207)

Petitioner was sentenced by the Trial Court to twelve months imprisonment on Count One, twelve months imprisonment on Count Two, Counts Three through Twelve to twelve months imprisonment concurrently to be served with the other counts herein. (T. 9-20)

Petitioner filed his motion for new trial which was denied, and the Petitioner then appealed his conviction to the Supreme Court of Georgia which on May 2, 1979 by opinion affirmed the judgment of conviction.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

The Georgia Statutes Which Make It A Criminal Offense For Using A Telephone For The Purpose Of Harassment Are Unconstitutional For Vagueness And Indefiniteness, Thus, They Are Repugnant To The United States Constitution For They Deny Due Process Of Law And The Equal Protection Of Laws.

In the Court below, the State, Respondent, urged that Petitioner had waived his right in the trial court to raise the constitutional question now presented to this court. The Supreme Court of Georgia deemed the constitutional question to be before it and upheld the validity of the statutes now under attack. "Where the State Court does not decide against an appellant upon an independent state ground, but deeming the federal question to be before it, actually - - - decides that question adversely to the federal rights asserted, this Court has jurisdiction to review the judgment if, as here, it is - - - - final - - - -." *Orr v. Orr*, No. 77-1119, Slip Opinion, dated March 5, 1979, Supreme Court of U.S. (not now officially reported), 47 LW 4224-4232.

The Fourteenth Amendment imposes upon the State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927). Criminal statutes must convey sufficiently definite warning as to prescribed conduct when measured by a common understanding and practices in order to meet the requirements of the Constitution. *U. S. v. Petrillo*, 332 U.S. 1 (1947).

This Court declared to be unconstitutional a Georgia statute, which is similar to the ones now under attack,

when it concluded the statute was too vague and indefinite. *Gooding, Warden v. Wilson,* 405 U.S. 518 (1972). Likewise, the failure of a Georgia statute to furnish a reasonable standard of guilt and which permitted "the jury to create its own standard in each case" was held to be unconstitutional in *Herndon v. Lowry,* 301 U.S. 242 (1937).

This Court in *Connally v. General Construction Co.,* 269 U.S. 385 (1926) at pages 392 and 393 cited and quoted with approval from the case of *U. S. v. Capital Traction Co.,* 34 App. D.C. 592 where the Court was considering a statute which made it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding" was held to be void for uncertainty and the Court used the following language: "The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit

of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

Trial counsel for Petitioner thought that the indictment was brought under the provisions of *Ga. Code Ann.* 104-9901, but counsel for Respondent insisted that it was couched in the language of *Ga. Code Ann.* 26-2610. (T. 130-134) The Trial Court instructed the jury on the provisions of the latter statute. (T. 193) Pertinent portions of both statutes were declared to be constitutional by the Supreme Court of Georgia. Thus, Petitioner is placed in the position of having to direct his attack at both statutes.

The indictment charges in each count that Petitioner did telephone Jones "for the purpose of annoying, harassing and molesting" Jones. (T. 187-190) At no time did the Court instruct the jury on what standards were to be used in making a determination of whether there was an annoyance, harassment, or molestation. The statutes under consideration do not set forth any such guidelines.

Our situation is identical with the one in *U. S. v. Capital Traction Co.,* supra. *There,* there was no guide to the Court or jury set forth to aid in determining what constituted a crowded car. *Here,* there are no standards or guides set forth in the statutes for the Court or jury to be governed by in ascertaining what constitutes annoyance, harassment or molestation. *There,* the Court said what may be regarded as a crowded car by one jury

may not be so considered by another. *Here,* what may be regarded by one jury as harassment, annoyance or molestation may not be so considered by another. *Here,* as *there,* there is a total absence of any definition of the essential elements of the charged offense. The essential elements of an offense cannot be left to conjecture or supplied by the Court or jury.

In America our citizens cannot be held to answer criminal charges under statutes whose provisions are so uncertain that they will reasonably admit of different constructions. Such is the case here. Both statutes leave too much to conjecture and are too indefinite and uncertain for a citizen to choose in advance of what course of conduct it is lawful for him to pursue. This Honorable Court, in many decisions handed down over the years, has forbidden a state to prosecute a citizen under statutes which have a double meaning, that is to say, that the citizens may act upon the one conception of the requirements of the statutes and the Court and jury upon another one.

CONCLUSION

Based on the authorities cited and the reasons advanced herein, this Petition for Writ of Certiorari should be granted and the judgment and opinion of the Supreme Court of Georgia should be reversed with directions that Petitioner's conviction be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Respondent, Honorable H. Lamar Cole, District Attorney for the Southern Judicial Circuit, Lowndes County Courthouse, Valdosta, Georgia 31601 and Honorable Arthur K. Bolton, Attorney General for the State of Georgia, Room 132, Judicial Building, Atlanta, Georgia 30334, with three copies of the foregoing Petition for Writ of Certiorari prior to offering the same for filing with the Clerk of the Supreme Court of the United States, by depositing a copy in the United States Mail in a properly addressed envelope with sufficient postage thereon to insure delivery.

This the 25th day of July, 1979.

FLOYD M. BUFORD
Counsel for Petitioner

APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF GEORGIA

34704

CONSTANTINO

v.

STATE

BOWLES, Justice.

(Decided May 2, 1979)

The evidence in this case would authorize the jury to find the following facts:

In October, 1977, appellant, Frank Constantino, telephoned Mr. John Paul Jones, a news reporter, and asked him to investigate certain difficulties appellant and his wife were having, particularly with the Department of Family and Children Services, which was attempting to take custody of the Constantinos' three children away from them. Mr. Jones went to visit appellant and his wife and subsequently investigated their allegations. After investigation, Mr. Jones determined that there was no news story to be had and informed appellant and his wife of this determination. Nevertheless, appellant and his wife continued to telephone Mr. Jones urging him to resume his investigation. The Constantino children were removed from the Constantino home by the Department of Family and Children Services, and on November 3, 1977, Mr. Jones testified at the DFCS custody hearing. The children were placed in foster care and on the Saturday following the

hearing Mr. and Mrs. Jones began receiving harassing phone calls from appellant and his wife. Mr. Jones testified that he had never received such phone calls prior to the hearing but that he had received hundreds since. At first the phone calls from appellant and his wife contained conversation but when Mr. Jones threatened to record the voices if they did not stop calling, the conversations ceased and the callers would simply telephone and then hang up when the Jones phone was answered. Mrs. Jones counted fifty-four telephone calls in a three hour period one day. After trying without success to get the phone calls stopped[1] Mr. Jones finally contacted the telephone company. On December 16, 1977 a telephone "drop" or "security trap" was placed on Mr. Jones telephone line. This device would reveal the originating telephone number of all calls received by the Jones telephone. Over a two day period, ten calls came in from appellant's telephone number. The security trap was removed from the Jones phone on December 23, 1977. Appellant and his wife were indicted for 12 counts of Using a Telephone for the Purpose of Harassment. Appellant appeals his conviction to this court.

We affirm.

Appellant was indicted for the offense of Using a Telephone for the Purpose of Harassment. There was some question at trial as to whether or not Code Ann. § 26-2610(e) or § 104-9901 was the specific statute appellant was being prosecuted under, however, the language of the indictment was sufficiently specific as to apprise appellant of the crime with which he was charged. Appellant was accused of knowingly and wilfully telephoning

1. The calls stopped once after Mr. Jones contacted appellant's attorney but resumed a week later. After charges were brought against appellant and his wife, the calls stopped again until shortly before the first trial date.

John Paul Jones and his wife, Jan Jones, repeatedly for the purpose of annoying, harassing and molesting them.

1. Appellant filed a general demurrer attacking the constitutionality of the statute under which he was indicted claiming it violates due process. Assuming arguendo that such challenge was timely and appropriately raised, we find the pertinent portions of both statutes constitutional. Code Ann. § 26-2610 states: "A person who commits any of the following acts is guilty of a misdemeanor: . . . (e) Telephones another repeatedly, whether or not conversation ensues, for the purpose of annoying, harassing or molesting another or his family, or uses over the telephone language threatening bodily harm. . ." Code Ann. § 104-9901 provides that the following act is a misdemeanor: "Whoever by means of telephone communication in this State: . . . (b) makes a telephone call whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number. . ." Appellant contends that this language is unconstitutionally vague and broad and thus violates due process as it fails to give adequate guidance to people trying to be law abiding and fails to advise defendants of the offense with which they are charged. Due process only requires that a statute convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." United States v. Petrillo, 332 U. S. 1, 8 (67 S. Ct. 1538, 91 LEd 1877) (1947). The plain meaning of the two statutes in question is that an individual may not make telephone calls for the purpose of harassing someone. The statutes are clear and could be readily understood by people of ordinary intelligence seeking to avoid their violation. See, *Lanthrip v. State,* 235 Ga. 10 (218 SE2d 771) (1975); see also, *Haisman v. State,* 242 Ga. 896, 897 (.....

SE2d .....) (1979). Appellant's primary complaint is that "what is or is not harassing, annoying or bothersome is merely a question of one's own interpretation." Presumably what appellant means by this is that a defendant telephoning someone could never know if he is harassing that person since what may be harassing to that person might not be harassing to another, i. e. the defenant will never know if he is committing a crime or not. The fallacy in this theory is that the victim's subjective ideas on what is or is not harassing are not in issue. The point is that the defendant telephones *intending* to harass and the defendant certainly knows if he is doing that.

Appellant's challenge to the constitutionality of the statutes is without merit.

2. Appellant asserts that the trial court erred in refusing to allow his counsel to show the jury that appellant's daughters had access to his telephone and could have committed the crimes for which appellant was tried and convicted. The record does not reflect that appellant attempted to show that the daughters had access to his telephone during this period. Rather, appellant stated that he was trying to show that other people were harassing the Joneses as well. Appellant's objection pertained only to the exclusion of testimony of a phone call by one of appellant's daughters to the Joneses early in December of 1977. This testimony was later admitted into evidence and thus if there had been any error in excluding the testimony, the issue is now moot. Furthermore, the evidence in the record, and particularly the testimony of the appellant himself, indicates that the daughters were in foster homes at the time of the calls intercepted by the security trap and thus could not have made calls which originated from appellant's telephone. For these reasons, appellant's second enumeration of error is meritless.

3. Appellant next contends that the trial court erred in allowing Jan Jones to identify the voices of the appellant and his wife from phone calls made to the Joneses. Appellant urges that since Mrs. Jones had never spoken with either party face to face that she was unable to properly authenticate the telephone conversations to which she testified. We find that Mrs. Jones was able to identify the appellant's voice and thus her testimony on conversations with him was properly admitted. On one occasion appellant telephoned and Mrs. Jones held the phone while Mr. Jones went to get his tape recorder to record the conversation. Mrs. Jones recognized the voice as the same voice who had previously identified himself as Frank Constantino (appellant). Mr. Jones, who had spoken to appellant both in person and by telephone, identified the voice to be that of the appellant. However, Mrs. Jones' identification of appellant's wife's voice was not based on similar facts. Although, generally speaking, proof of telephone conversations may be admissible in evidence when the identity of the person against whom the conversation is sought to be admitted is established by circumstantial as well as direct evidence, [see, e. g. *Dowdle v. West Lumber Co.*, 79 Ga. App. 663 (54 SE2d 682) (1949) and *Ayers v. John B. Daniel Co.*, 35 Ga. App. 511 (133 SE 878) (1926)], an identification is not sufficient if identity is established only by what is said in the conversation itself. *Price v. State*, 208 Ga. 695 (69 SE2d 253) (1952). Since Mrs. Jones could only identify appellant's wife from the conversations themselves, it was error for the trial court to admit testimony of those conversations into evidence. Nevertheless, in this instance, we conclude the error was harmless.[2] No count of appellant's indictment was based on any conversation had be-

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2. Appellant has not even argued that this error *was* harmful much less *how* it was harmful. Nor have we been able to discern how the error was harmful under the facts of this case.

tween Mrs. Jones and appellant's wife. The testimony about these conversations was simply cumulative of testimony by Mr. Jones who properly identified the voices of both appellant and his wife in harassing phone calls. Mr. Jones testified that they received hundreds of harassing telephone calls. Mrs. Jones counted fifty-four (54) calls one afternoon between the hours of 1:00 p.m. and 4:00 p.m. It is highly probable that the error did not contribute to the judgment in this case. See *Johnson v. State,* 238 Ga. 59, 61 (230 SE2d 869) (1976).

4. Appellant contends that the jury's verdict was contrary to the law and the weight of the evidence, and therefore, his motion for a directed verdict of acquittal should have been granted. Appellant's minimal attempt to argue this ground should probably be held insufficient to raise a question for review. However, since there was clearly evidence to support the verdict we will simply go ahead and say so. It is the duty of the jury to weigh the evidence and its verdict of guilty will not be disturbed on appeal if there is any evidence to support it. *Cunningham v. State,* 235 Ga. 126, 127 (218 SE2d 854) (1975).

Judgment affirmed. All the Justices concur.